Supreme Court, U.S.
FILED
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NO. 93-914

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT O. CUPIT AND DONNA BLAIR CUPIT
Petitioners

VERSUS

McCLANAHAN CONTRACTORS, INC., FORMERLY AWI DRILLING AND WORKOVER, INC.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the Fifth Circuit Court of Appeals violate the appropriate standard for appellate review of the judgment of the Trial Court Judge in this admiralty case?

2. Did the actions of the Fifth Circuit Court of Appeals, in reversing the District Court's judgment dismissing the limitation of liability claim of AWI Drilling and Workover, Inc. (hereinafter "AWI") have the effect of incorrectly depriving plaintiffs of a judgment against AWI for damages in excess of the value of the vessel?

LIST OF PARTIES

The caption of the case in the court contains the names of all parties to the proceeding in the Court of Appeals insofar as its judgment is sought to be reviewed.

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DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit is reported. It is reproduced in the appendix of this Petition.

STATEMENT OF JURISDICTION

The Judgment (opinion) of the Court of Appeal was entered on September 10, 1993. A Petition for Rehearing was denied on October 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Jurisdiction in the Trial Court was based on the Jones Act (46 U.S.C.A. Section 688), the General Maritime Law (28 U.S.C.A. Section 1333), as well as under diversity of citizenship of the parties (28 U.S.C.A. Section 1332).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

46 U.S.C.A. Section 183(a), (Limitation of Liability Statute):

> (a) Any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner, shall not, ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C.A. Section 183(e):

> (e) In respect of loss of life or bodily injury

> the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed exclusively the privity or knowledge of the owner of such vessel.

STATEMENT OF THE CASE

This petition arises out of a ruling by the Fifth Circuit Court of Appeals which reversed a District Court ruling favorable to the plaintiffs and a denial of plaintiffs' motion for rehearing. The original suit in the District Court was filed pursuant to jurisdiction conferred by 46 U.S.C.A. 688, 28 U.S.C.A. 1333 and 28 U.S.C.A. 1332.

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit Court of Appeals, which reversed a District Court judgment favorable to plaintiffs, violated the appropriate standard for appellate review in an admiralty case, as enunciated in *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954). The Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision (see Rule 10 of the Supreme Court Rules).

2. The actions of the Fifth Circuit Court of Appeals, which reversed a District Court judgment favorable to plaintiffs, had the effect of depriving plaintiffs of a damage award granted to them by the District Court, in excess of the

value of the vessel. Such a decision is in conflict with the decisions of both the Fifth Circuit Court of Appeals and other Circuit Courts of Appeal regarding limitation of liability (see Rule 10.1(a) of the Supreme Court Rules).

ARGUMENT

In its decision of September 10, 1993, the Fifth Circuit Court of Appeals reversed the judgment of the District Court, which denied limitation of liability of AWI. The District Court's judgment emphasizes that the jury found that AWI was negligent and that AWI's Rig No. 8 was unseaworthy. In *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954), the Supreme Court held:

> In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals *may not* set aside the judgment below unless it is clearly erroneous. (Emphasis supplied.)

It is respectfully submitted to this Honorable Court that in reversing the District Court's judgment in this case, the Fifth Circuit Court of Appeals has not followed the Supreme Court's decision in *McAllister v. United States*, supra.

The factual findings of the Trial Court (Appendix, pp. 113-15), are set forth below:

> Cupit was working as a derrickman aboard

the AWI Rig No. 8 on August 4, 1990. Rig No. 8, a vessel, is a movable drilling rig which was in a drilling mode at the time of the accident. The drilling crew was attempting to retrieve a pump out disc which was in the hole. In order to prevent mud from dropping into the hole while this "fishing expedition:" was being conducted, the hole was "pressured up", i.e., air pressure was pumped into the hole. When the pressure in the hole reached 3,000 pounds per square inches (p.s.i.), the driller instructed Cupit, the derrickman, to bleed off the pressure. The driller did not specify which method the derrickman should use to bleed the pressure off, or provide any warning about choosing a particular method when the pressure approached 3,000 p.s.i. While there are different methods for accomplishing this task, Cupit attempted to bleed off the pressure using the method which he had used previously many times. He proceeded to open a two inch valve on the fill up line, which was a rubber, steel reinforced hose. The pressure was too high in the hole and it caused the fill up line to blow off and the chicksan line to strike Cupit violently in the face and neck, causing him to fall backward. Cupit was initially hospitalized for several days, as drilling mud was injected into his cheek and jaw. He underwent two facial surgeries and is scheduled to have back surgery as a result of the accident.

The toolpusher aboard rig No. 8, whom the defendant called to testify as a lay expert, opined that the pressure should never have been bled off using that method when there was 3,000 p.s.i. in the hole. He agreed that the derrickman's method

of bleeding off had been used many times, but that it should not have been used at 3,000 p.s.i. While the defendant's argument at the jury trial and at the limitation hearing was that the plaintiff was the sole cause of the accident because he opened the valve too fast, the evidence strongly indicated that the fill-up line should not be used to bleed off pressure when the pressure exceeds the rated capacity of the hose, which was below 1,500 p.s.i. in the hole. The evidence also showed that all the other AWI rigs had steel hoses with higher ratings for their fill-up lines, and that following this accident, the fill-up line in question was replaced with a steel hose.

The president of AWI Drilling & Workover, Inc. testified at the limitation hearing. He agreed that the fill-up lines should not have been used to bleed off pressure when there is 3,000 p.s.i. While he suggested the derrickman should have known that, he also testified that the derrickman is not given the opportunity to go to blow out prevention training school, but that this schooling is afforded to the driller and the toolpusher. The derrickman is shown a film on blow out prevention, the same film shown to the toolpushers and the drillers. Despite the jury's finding, the testimony that bleeding off through the fill-up line should never be done when there is 3,000 p.s.i., the AWI president opined that the cause of the accident was the plaintiff's opening the valve too quickly.

The testimony was unequivocal that the toolpusher is in charge of all operations on his particular drilling rig. He reports daily to the main

> office and is in communication with main office by telephone and by radio. He supervises all employees aboard that rig as well as all operations conducted on the rig. If he observes any unsafe practice on the rig, or is instructed by the oil company representative to conduct some operation in violation of safety regulations, he is fully authorized to, and indeed directed to, shut down the operation. The toolpusher in question was totally familiar with the operation in question that was being conducted and, as stated previously, was called as a lay witness by the defendant to testify as to the safety of the practice. The toolpusher is ultimately responsible for all men and all equipment on the rig.
>
> The driller also supervises the derrickman as well as the drilling operation. The derrickman is in charge of the mud and mud lines being used in drilling operations. While the operation in question did involve the use of a fill-up mud line, the entire "fishing expedition" was being conducted by the driller and it was the driller who instructed the derrickman to bleed off pressure.

Plaintiffs' negligence and unseaworthiness claims were tried to a jury, who returned a verdict in their favor, finding AWI to be negligent and Rig No. 8 to be unseaworthy. The evidence adduced at trial proved that both the toolpusher and the president of the corporation *had knowledge* that bleeding off pressure through the rubber fill-up line when there is 3,000 p.s.i. was not safe. The jury found that the toolpusher and the president were both negligent because *they knew or should have known* that

the plaintiff would use this method to bleed the pressure in the hole.

A hearing on limitation of liability was held before the District Court Judge. The Court held that the toolpusher was a managing agent of Rig No. 8, whose authority *extended over the phase of the operation in which plaintiff was injured.* His knowledge was imputable to the corporation. The Court held that AWI failed to meet its burden of demonstrating that it is entitled to limitation and consequently was not entitled to limit its liability pursuant to 46 U.S.C.A. 183(e).

Once an injured seaman has established that the negligence of his employer or the unseaworthiness of the vessel caused his injuries, the burden of proof shifts to the vessel owner to establish lack of privity or knowledge of the dangerous condition that caused the injury. *Brister v. A.W.I.,* 946 F.2d 350, 359 (5th Cir. 1991); *Complaint of Cirigliano,*708 F.Supp. 101 (D.N.J. 1989); *Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279 (7th Cir 1992), *In Re Sause Bros. Ocean Towing,* 769 F.Supp. 1147 (D. Or. 1991); *In Re Lloyd's Leasing Ltd.,* 764 F.Supp 1114 (S.D. Tex. 1990) *Complaint of G & G Shipping Co., Ltd. of Anguilla,* 767 F. Supp. 398 (D. Puerto Rico 1991); *Complaint of Seiriki Kisen Kaisha,* 629 F.Supp. 1374 (S.D. N.Y. 1986); *Complaint of Hercules Carriers, Inc.* 566 F.Supp. 962 (M.D. Fla. 1983); *Tug Ocean Prince, Inc. v. United States,* 584 F.2d 1151 (2nd Cir. 1978). The District Court found that AWI had not met its burden of proving that it did not have privity or knowledge.

"Privity or knowledge" has been described as a sort

of 'complicity in the fault that caused the accident'." *Brister,* 946 F.2d at 356; *Nuccio v. Royal Indem. Co.,* 415 F.2d 228, 229 (5th Cir. 1969) (quoting *In Re Read's Petition,* 224 F.Supp. 241, 251 (S.D. Fla. 1963). "Generally, a finding of negligence indicates complicity in the cause of the accident sufficient to make limitation unavailable." *Brister,* 946 F.2d at 356. Further, the *Brister* Court explained that:

> [D]emonstrating a lack only of actual knowledge does not meet the owner's burden to show a lack of privity of knowledge. Privity or knowledge does not necessarily require a showing of actual knowledge. It is deemed to exist if the shipowner has the means of obtaining knowledge, or if he would have obtained the knowledge by reasonable inspection. [citation omitted] Knowledge is not only what the shipowner knows, but what he is charged with discovering. 946 F.2d at 358.

In this instance, the shipowner is a corporation. The Fifth Circuit addressed the question of when a corporation acquires the "privity or knowledge" of the negligent acts of its employees. In *Continental Oil Company v. Bonanza,* 677 F.2d 455 (5th Cir. 1982):

> 'A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its liability.' *Coryell v. Phipps,* 317 U.S. 406, 410, 63 S.Ct. 291, 293 (1943). The crucial issue is how high on the corporate ladder must one climb before charging the corporation with privity or knowledge. In *Coryell,* the court

> observed that the test is whether 'the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred.' 317 U.S. at 410, 63 S.Ct. at 293. 667 F.2d at 466-467.

The *Continental* Court recognized that "[t]here is no simple test to determine when a manager of a corporation binds the corporation with his privity or knowledge." *Id.* at 467. The Courts have emphasized that if the manager *has authority over the operation being conducted at the time of the injury, the manager's privity or knowledge will be imputed to the corporation.*

In *Continental,* the Appellate Court affirmed the District Court's findings that the knowledge of the captain of the vessel bound the corporation, particularly when the captain also maintains the vessel and entered into contracts on its behalf.

Based upon the evidence adduced at trial, the Trial Court found that the toolpusher had the authority to control and the duty to supervise every operation aboard Rig No. 8. He had authority over all phases of operations on Rig No. 8, including specifically "fishing expeditions", pressuring up and bleeding off procedures.

The Fifth Circuit Court of Appeals has clearly misinterpreted *Continental* as standing for the proposition that *only* an agent who is vested with *complete* authority over a vessel (as in the *Continental* case) can bind its principal for limitation purposes. The following excerpt from

the Court's opinion refutes the Fifth Circuit Court of Appeals' opinion in the instant case:

> The relevant question, though, is not simply: 'was Freeman a managing agent?' The navigational negligence of a master who also occupies a managerial position in a corporation does not of itself deprive the corporation of the right to petition for limited liability. *** The master's mistake is not the fault of the shipowner 'simply because the master has been given broad and unlimited agency powers over the operation and maintenance of the vessel.' *** *It must be established that Freeman was a managing agent with respect to the field of operations in which the negligence occurred.* The evidence suffices to support the district court's implicit conclusion that he was. 706 F.2d 1365, 1376 (emphasis supplied).

Thus the Court in *Continental* once again followed the *Coryell* "phase of operations" test. Its application to the instant case should yield the same result. That Freeman's authority was broader and less limited than Doyle Samples' is, in the above quoted words of this Court, not relevant. What is relevant is Samples obvious and undisputed control over the precise "field of operations" in which the negligence in this case occurred.

Petitioners respectfully submit that the judgment of the Fifth Circuit Court of Appeals is inconsistent with and is a drastic departure from the decisions in the Fifth Circuit and others which have characterized the doctrine of limitation of liability as an anachronism in the admiralty law, and which have confined its applications to parameters which

have been narrowly drawn. In support of this, petitioners submit the following cases for this Court's review:

In *The Linseed King, Spencer Kellogg & Sons v. Hicks,* 285 U.S. 502, 52 S.Ct. 450 (1932), the corporation was not entitled to limit its liability when the factory manager of a corporation which ran a ferry across a river failed to halt the ferry on a winter day and the ferry struck an ice floe and sank, causing the drowning death of several employees. The Supreme Court maintained that the factory manager had both the duty and authority to stop the ferry from crossing the river in icy conditions and his knowledge bound the corporation. 285 U.S. at 511, 52 S.Ct. at 452.

The Fifth Circuit Court of Appeal in the case of *Pennzoil Producting Co. v. Offshore Exp., Inc.,* 943 F.2d 1465 (5th Cir. 1991) addressed the issue of limitation of liability. The Court maintained that evidence that the vessel owner's general manager knew that masters of its vessels operated the vessels in fog and that on occasion accidents had resulted established that the owner had knowledge of the cause of loss between the vessel and pipeline. The Court held that the captain's negligence in navigating the vessel on a foggy night, precluded the owner from limiting its liability under the Limitation of Liability Act.

In *Petition of United States Dredging Corporation,* 225 F.Supp. 730 (E.D. N.Y. 1964), the Court of Appeal addressed the issue of whether an executive officer or supervisory employee, if any, occupied such a high managerial position so as to render his privity or knowledge of the petitioner. Petitioner sought limitation of liability for damage resulting from an accident stemming from negligent con-

duct of its *watchman* in leaving three moored tugs unattended. The Court held that evidence was insufficient to sustain petitoners burden of proving that the negligent conduct of the watchman was without its privity or knowledge.

In *The Complaint of Hercules Carriers, Inc.*, 566 F.Supp. 962 (N.D. Fla. 1983), the shipowner filed a limitation of liability claim in a case involving a collision of its vessel with a bridge during a storm. The Court held that the shipowner failed to man the vessel with a competent crew and the shipowner had knowledge or privity of specific acts of negligence or conditions of unseaworthiness which precluded the limitations claim. The Court held:

> Where a vessel owner by its prior action or inaction sets into motion a chain of circumstances which *may be a contributing cause even though not the immediate proximate cause of the casualty, the right to limitation is properly denied.* 566 F.Supp. 962 at 982 (emphasis supplied).

In *Villers Seafood Co., Inc. v. Vest*, 813 F.2d 339 (11th Cir. 1987), the Court of Appeal held that a shipowner could not limit their liability for injuries sustained by its employee as a result of unseaworthiness of the vessel. The Court held that the owner was charged with knowledge of the existence of the defect where the vessel was unseaworthy due to equipment which was defective *at the start of the voyage.*

In *Illinois Constructors Corp. v. Lugan Transp., Inc.*, 715 F.Supp. 872 (N.D. Ill. 1989) the Court of Appeal held

that in cases of a corporate owner, privity or knowledge of the owner, for purposes of the Limitation of Liability Act, is that of his employees vested with *supervisory or discretionary authority, such as maritime superintendents.*

In *The Matter of Oil Spill by the Amoco Cadiz,* 954 F.2d 1279 (7th Cir. 1992), the Court of Appeal held that the shipowner was not entitled to limit its liability for an oil spill occurring when the supertanker ran aground where it did not meet its burden of proving its lack of privity or knowledge of negligence that led to the vessel's grounding. Evidence at trial indicated that two of the vessel's inspectors were the shipowner's employees, who included descriptions of the vessel's problems in *written reports sent to company offices.*

CONCLUSION

Review by the United States Supreme Court in this case is warranted because the Fifth Circuit Court of Appeals violated the appropriate standard for appellate review in reversing the Trial Judge's judgment, and its decison unreasonably expands the historically narrowly drawn defense of limitation of liability by allowing a shipowner to invoke limitation simply by retaining some modicum of authority from its managing agent.

Based upon the evidence presented at trial, the jury properly found AWI negligent and its vessel unseaworthy. The jury found that the toolpusher *and the president of the corporation* were both negligent because they knew or should have known that the method in which plaintiff was

bleeding the pressure in the hole was unsafe. The toolpusher as managing agent of the corporatioin aboard Rig No. 8 was the supervisor of all operations on the rig, including the particular "phase" of the drilling operation which led to plaintiff's injury. In fact, his knowledge was reported to AWI on a daily basis. His knowledge was AWI's knowledge, his negligence was AWI's negligence.

Based upon those findings, the Trial Court Judge properly denied AWI's limitation of liability claim. The denial of such claim *was not manifestly erroneous.* However, the reversal of this judgment by the Fifth Circuit was "clearly erroneous" under *McAllister.* In applying the "clearly erroneous" standard to the findings of a District Court sitting without a jury, *appellate courts must constantly have in mind that their function is not to decide factual issues de novo. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 84 L.Ed. 2d. 518, 105 S.Ct. 1504 (1985).

The ultimate effect has been that plaintiffs' have been deprived of a damage award granted to them by the District Court, in excess of the value of the vessel, contrary to Appellate Court standards of review, and clearly in conflict with decisions of both the Fifth Circuit Court of Appeals and other Circuit Court of Appeals regarding the issue of limitation of liability.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FIFTH CIRCUIT
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TEL. 504-589-6514
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NEW ORLEANS, LA 70130

September 10, 1993

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 92-3563 - Cupit v. McClanahan Contractors

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

The judgment entered provides that plaintiff-appellees pay to defendant-appellant the costs on appeal.

Very truly yours,

RICHARD E. WINDHORST, JR.,
Clerk

By: /s/Deborah M. Taylor
Deputy Clerk

Enclosure
Mr. Wood Brown, III
Mr. Randy Jay Ungar

A-3

Robert O. CUPIT and Donna Blair Cupit,
Plaintiffs-Appellees,

v.

McCLANAHAN CONTRACTORS, INC.,
formerly, AWI, Inc.,
Defendants,

AWI Drilling and Workover, Inc.,
Defendant-Appellant.

No. 92-3563

United States Court of Appeals,
Fifth Circuit.

Sept. 10, 1993.

Derrickman aboard movable drilling rig sued rig owners after fill-up line blew causing derrickman severe injuries. The United States District Court for the Eastern District of Louisiana, Marcel Livaudais, Jr., J., denied limitation of liability, and appeal was taken. The Court of Appeals, Edith H. Jones, Circuit Judge, held that although toolpusher was aware that fill-up line had been used to bleed off pressure and that that method was unsafe, toolpusher's role and scope of authority was relatively limited so that finding that toolpusher was managing agent was clearly erroneous and his negligence could not be attributed to shipowner to deny limitation of liability.

Reversed and rendered.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, JOLLY and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

McClanahan Contractors, Inc. appeals a district court decision denying limitation of liability. The district court based its decision on its findings that Doyle Samples, the toolpusher in charge of the rig, was a managing agent of the vessel and that, therefore, his knowledge was imputable to the corporation.
We reverse.

I.

Robert Cupit was a derrickman aboard McClanahan (then AWI, Inc.) Rig No. 8, a movable drilling rig. On August 4, 1990, the drilling crew was conducting a "fishing expedition" to retrieve a pump-out disk from the hole. Cupit was assigned to bleed off the air pressure used to prevent mud from dropping into the hole. Cupit had performed this task many times previously by bleeding the pressure through the fill-up line, but this time the pressure was too high and the fill-up line blew, causing Cupit severe injuries.

Cupit sought and obtained a sizeable jury verdict to compensate his injuries, and McClanahan sought to limit its liability under 46 U.S.C. § 183(a). Mr. McClanahan, the company president, testified that the fill-up line should not have been used to bleed off pressure at 3000 psi. There

was no evidence, however, that Mr. McClanahan knew or should have known that Cupit was using that particular method to bleed off pressure. Samples, on the other hand, testified that he was aware that the fill-up line had been used many times to bleed off pressure. Samples knew the safe and proper way to bleed off pressure and should have warned Cupit against using the fill-up line.

II.

[1] Once an injured seaman has established that his employer's negligence caused his injuries, a vessel owner seeking limitation of liability must prove that it lacked privity or knowledge of the negligence. *See Brister v. AWI, Inc.,* 946 F.2d 350, 359 (5th Cir. 1991); *In re Ferrell Lines, Inc.,* 530 F.2d 7, 10 (5th Cir.1976).

[2] "Privity or knowledge," sometimes described as "complicity in the fault," *Brister,* 946 F.2d at 356, extends beyond actual knowledge to knowledge that the ship owner would have obtained by reasonable investigation. *Id.* at 358.

[3] For the purposes of limitation, a corporation is charged with the privity or knowledge of its employees when they are sufficiently high on the corporate ladder. The Supreme Court in *Coryell v. Phipps,* 317 U.S. 406, 410, 63 S.Ct. 291, 293, 87 L.Ed. 363 (1943), stated that privity or knowledge is imputed to the corporation when the employee is "an executive officer, manager or superintendent whose scope of authority included supervision over the phase of the business out of which the loss or injury occurred."

[4] In *Continental Oil Co. v. Bonanza*, 706 F.2d 1365 (5th Cir.1983) (en banc), we rejected the assertion that the navigational negligence of a master who also occupies a managerial position in a corporation will automatically deprive the corporation of the right to limit its liability. 706 F.2d at 1376. The fact that a ship's master has been given broad and unlimited agency powers over the operation and maintenance of the vessel is insufficient to impute the master's mistake to the shipowner. *Id.* Rather, the dispositive question is whether the corporate employee is a "managing agent" with respect to the field of operations in which the negligence occured. *Id.*

[5,6] The district court found that Samples supervised all operations aboard Rig No. 8 and had the authority to control every operation thereon. We will overturn the district courts findings only if they are clearly erroneous. "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *TransOrient Navigators Co. v. M/S Southwind*, 714 F.2d 1358, 1364 (5th Cir.1983). We are left with such a conviction in this case. While Samples, as toolpusher, had significant authority over the drilling job then in progress, his corporate position was insufficiently high and the scope of his authority was concomitantly inadequate to impute his knowledge to the corporation for the purpose of denying limitation of liability.

III.

Samples admittedly had "authority over all phases of operations on Rig No. 8." But the circumstances led the

district court to over-state the scope of Samples's authority. As long as the vessel was stationary and drilling, Samples, as toolpusher, had authority over the drilling job. But so did nine other toolpushers on any shift if each of McClanahan's nine other rigs was operating, Moreover, when that drilling job was over, Samples had no say about when and where the next drilling job would begin. For the duration of any particular drilling job, Samples's role was to oversee the drilling on one rig on a shift basis. but his authority did not extend to the basic business decisions made by the drilling supervisors and the president of the company.

[7] Because Samples's role and the scope of his authority were relatively limited, the district court's finding that Samples was a managing agent is clearly erroneous. *See Contnental Oil Co., supra.* His negligence could not be attributed to the shipowner to deny limitation of liability. McClanahan was entitled to limit its liability under 46 U.S.C. § 183(a). Therefore, we REVERSE and RENDER judgment accordingly.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3563

FILED
OCT 5 1993

ROBERT O. CUPIT AND
DONNA BLAIR CUPIT,
Plaintiffs-Appellees,

versus

MCCLANAHAN CONTRACTORS, INC.,
formerly, AWI, Inc.,
Defendants,

AWI DRILLING AND WORKOVER, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING

(October 5, 1993)

Before Johnson, E. G. Jolly and E. H. Jones, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *Denied*.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT O. CUPIT	CIVIL ACTION
versus	NO. 90-3289
AWI DRILLING & WORKOVER, INC.	SECTION: E/3

J U D G M E N T

Considering the record, the evidence adduced at the personal injury jury trial and the non-jury limitation trial, the answers of the jury to the interrogatories propounded to it by the Court, the Findings and Conclusions entered this date by the Court, and the law, for the reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of plaintiff, Robert O. Cupit, and against defendant, AWI Drilling & Workover, Inc., in the true sum of TWO HUNDRED TEN THOUSAND AND 00/100 ($ 210,000.00) DOLLARS, plus interest from the date of entry of judgment, and costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein on the limitation of liability proceeding in favor of claimant, Robert O. Cupit, and against plaintiff-in-limitation, AWI Drilling & Workover, Inc., dismissing its claim for limitation of liability.

New Orleans, Louisiana, this ____ day of April, 1992.

MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT O. CUPIT	CIVIL ACTION
versus	NO. 90-3289
AWI DRILLING & WORKOVER, INC.	SECTION: E/3

FINDINGS AND CONCLUSIONS

This civil action arises out of an accident sustained by Robert O. Cupit ("Cupit") on August 4, 1990 while working as a Jones Act seaman employed by AWI Drilling & Workover, Inc. ("AWI") aboard AWI Rig No. 8. The plaintiff filed suit for damages under the Jones Act due to the defendant's alleged negligence and under the general maritime law due to the alleged unseaworthiness of Rig No. 8. The defendant denied all liability and also filed a claim seeking limitation of liability.

Cupit's negligence and unseaworthiness claims were tried to a jury, who returned a verdict in his favor, finding AWI to be negligent and Rig No. 8 to be unseaworthy. The jury assessed AWI to be 70 percent at fault and Cupit 30 percent at fault in causing the accident. After the deduction for contributory negligence, the plaintiff was awarded a total of $ 210,000.00.

A hearing on limitation of liability was held before the Court sitting without a jury. The following findings of fact and conclusions of law are hereby entered on the basis

of the evidence presented both at the jury personal injury trial and the non-jury limitation of liability trial.

I.

Cupit was working as a derrickman aboard the AWI Rig No. 8 on August 4, 1990. Rig No. 8, a vessel, is a movable drilling rig which was in a drilling mode at the time of the accident. The drilling crew was attempting to retrieve a pump out disc which was in the hole. In order to prevent mud from dropping into the hole while this "fishing expedition" was being conducted, the hole was "pressured up", i.e., air pressure was pumped into the hole. When the pressure in the hole reached 3,000 pounds per square inch (p.s.i.), the driller instructed Cupit, the derrickman, to bleed off the pressure. The driller did not specify which method the derrickman should use to bleed the pressure off, or provide any warning about choosing a particular method when the pressure approached 3,000 p.s.i. While there are different methods for accomplishing this task, Cupit attempted to bleed off the pressure using the method which he had used previously many times. He proceeded to open a two inch valve on the fill up line, which was a rubber, steel reinforced hose. The pressure was too high in the hole and it caused the fill up line to blow off and the chicksan line to strike Cupit violently in the face and neck, causing him to fall backward. Cupit was initially hospitalized for several days, as drilling mud was injected into his cheek and jaw. He underwent two facial surgeries and is scheduled to have back surgery as a result of the accident.

The toolpusher aboard Rig No. 8, whom the

defendant called to testify as a lay expert, opined that the pressure should never have been bled off using that method when there was 3,000 p.s.i. in the hole. He agreed that the derrickman's method of bleeding of had been used many times, but that it should not have been used at 3,000 p.s.i. While the defendant's argument at the jury trial, and at the limitation hearing was that the plaintiff was the sole cause of the accident because he opened the valve too fast, the evidence strongly indicated that the fill-up line should not be used to bleed off pressure when the pressure exceeds the rated capacity of the hose, which was below 1,500 p.s.i., and particularly when there is 3,000 p.s.i. in the hole. The evidence also showed that all the other AWI rigs had steel hoses with higher ratings for their fill-up lines, and that following this accident, the fill-up line in question was replaced with a steel hose.

The president of AWI Drilling & Workover, Inc. testified at the limitation hearing. He agreed that the fill-up line should not have been used to bleed off pressure when there is 3,000 p.s.i. While he suggested the derrickman should have known that, he also testified that the derrickman is not given the opportunity to go to blow out prevention training school, but that this schooling is afforded to the driller and the toolpusher. The derrickman is shown a film on blow out prevention, the same film shown to the toolpushers and the drillers. Despite the jury's finding, the testimony of the toolpusher, and his own testimony that bleeding off through the fill-up line should never be done when there is 3,000 p.s.i., the AWI president opined that the cause of the accident was the plaintiff's opening the valve too quickly.

The testimony was unequivocal that the toolpusher is in charge of all operations on his particular drilling rig. He reports daily to the main office and is in communication with the main office by telephone and by radio. He supervises all employees aboard that rig as well as all operations conducted on the rig. If he observes any unafe practice on the rig, or is instructed by the oil company representative to conduct some operation in violation of safety regulations, he is fully authorized to, and indeed directed to, shut down the operation. The toolpusher in question was totally familiar with the operation in question that was being conducted and, as stated previously, was called as a lay witness by the defendant to testify as to the safety of the practice. The toolpusher is ultimately reesponsible for all men and all equipment on the rig.

The driller also supervises the derrickman as well as the drilling operation. The derrickman is in charge of the mud and mud lines being used in drilling operations. While the operation in question did involve the use of a fill-up mud line, the entire "fishing expedition" was being conducted by the driller and it was the driller who instructed the derrickman to bleed off pressure.

II.

This Court has subject matter jurisdiction of this claim pursuant to 28 U.S.C. § 1333, as it is a civil case arising under the admiralty and maritime laws of the United States.

The limitation of liability statute provides that a shipowner's liability for "any act, matter, or thing, loss,

damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner, shall not, . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. § 183(a) (emphasis added). The statute also provides that "[i]n respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel." 46 U.S.C. § 183(3) (emphasis added).

Once an injured seaman has established that the negligence of his employer or the unseaworthiness of the vessel caused his injuries, the burden of proof shifts to the vessel owner to establish lack of privity or knowledge of the dangerous condition that caused the injury. *Brister v. A.W.I., Inc.*, 946 F.2d 350, 359 (5th Cir. 1991); *In re Farrell Lines, Inc.*, 530 F.2d 7, 10 (5th Cir. 1976). Since Cupit has proven both that his injuries were caused by his employer's negligence and by the ship's unseaworthiness, the question is whether AWI has met its burden of proving that it did not have privity or knowledge.

"Privity or knowledge" has been described as a sort of "complicity in the fault that caused the accident." *Brister*, 946 F.2d at 356; *Nuccio v. Royal Indem. Co.*, 415 F.2d 228, 229 (5th Cir. 1969) (quoting *In re Read's Petition*, 224 F.Supp. 241, 251 (S.D. Fla. 1963). "Generally, a finding of negligence indicates complicity in the cause of the accident sufficient to make limitation unavailable." *Brister*, 946 F.2d at 356. Further, the *Brister* explained that:

> [D]emonstrating a lack only of actual knowledge does not meet the owner's burden to show a lack of privity of knowledge. Privity or knowledge does not necessarily require a showing of actual knowledge. It is deemed to exist if the shipowner has the means of obtaining knowledge, or if he would have obtained the knowledge by reasonable inspection. [citation omitted] Knowledge is not only what the shipowner knows, but what he is charged with discovering.

946 F.2d at 358.

In this instance, the shipowner is a corporation. The Fifth Circuit addressed the question of when a corporation acquires the "privity or knowledge" of the negligent acts of its employees in *Continental Oil Company v. Bonanza*, 677 F.2d 455 (5th Cir. 1982):

> 'A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its liability.' *Coryell v. Phipps*, 317 U.S. 406, 410, 63 S.Ct. 291, 293 (1943). The crucial issue is how high on the corporate ladder must one climb before charging the corporation with privity or knowledge. In *Coryell*, the court observed that the test is whether the negligence is that of an executive officer, menager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred.' 317 U.S. at 410, 63 S.Ct. at 293.

677 F.2d at 466-467.

The *Continental* court recognized that [t]here is no simple test to determine when a manager of a corporation binds the corporation with his privity or knowledge." *Id.* at 467. The courts have emphasized that if the manager has authority over the operation being conducted at the time of the injury, the manager's privity or knowledge will be imputed to the corporation. For example, in *The Lindseed King, Spencer Kellogg & Sons v. Hicks,* 285 U.S. 502, 52 S.Ct. 450 (1932), the corporation was not entitled to limit its liability when the factory manager of a corporation which ran a ferry across a river failed to halt the ferry on a winter day and the ferry struck a ice floe and sank, causing the drowning death of several employees. The Supreme Court maintained that the factory manager had both the duty and the authority to stop the ferry from crossing the river in icy conditions and his knowledge bound the corporation. 285 U.S. at 511, 52 S.Ct. at 452. In *Continental,* the appellate court affirmed the district court's findings that the knowledge of the captain of the vessel bound the corporation, particularly when the captain also maintained the vessel and entered into contracts on its behalf.

In the case *sub judice,* the evidence adduced proved that both the toolpusher and the president of the corporation had knowledge that bleeding off pressure through the rubber fill-up line when there is 3,000 p.s.i. was not safe. The toolpusher, who supervises all operations aboard Rig No. 8 and who unquestionable knew the safe and proper way to bleed off pressure, should have warned the plaintiff that the fill-up line should not be used to bleed off pressure when the pressure was that high. The toolpusher and the

driller receive special blow out prevention training above that which is provided to the derrickman. The toolpusher had both the duty to ensure that this operation, which was dangerous, was done properly and the authority to direct the driller and the derrickman to perform it properly and safely.

AWI argues that the toolpusher is not a "managing agent" for limitation purposes, and that his knowledge does not bind the corporation. Certainly, the president of the corporation is a "Managing agent" and he acknowledged that the method of bleeding pressure used was not safe in high pressure situations. Contrary to AWI's asertions, however, it is equally clear that a toolpusher is a "managing agent" as contemplated by the limitation statute. AWI argues that while the toolpusher "had pretty much absolute authority over Rig 8, but . . . he did not have authority over a 'phase' of the defendant's operation." Defendant's Supplemental Trial Memorandum, p. 3 (emphasis added). Neither the testimony at trial nor the case law support AWI's contention.

The toolpusher had the authority to control and the duty to supervise every operation aboard Rig No. 8. He had authority over all phases of operations on Rig No. 8, including specifically "fishing expeditions", pressuring up, and bleeding off precedures. He could direct if the operation was to be done, when it was to be done, and how it was to be done. In the world of the AWI president, the toolpusher is ultimately responsible for the men and the equipment aboard that rig. The Supreme Court held in The Lindseed King that the factory manager's negligence in failing to halt river crossings in icy conditions defeated the

ferry owner's limitation proceeding. Certainly, the factory manager did not operate the ferry and was not specifically assigned to that "phase" of the corporation's work, but the Court found that he had the duty and the authority to control the ferry's operations. 285 U.S. at 511, 52 S.Ct. at 452. Under this rationale, the toolpusher is a managing agent of Rig No. 8 whose authority extended over the phase of the operation in which plaintiff was injured. His knowledge is imputable to the corporation.

AWI has failed to meet its burden of demonstrating that it is entitled to limitation and consequently is not entitled to limit its liability pursuant to 46 U.S.C. § 183(3). Judgment shall be entered in favor of plaintiff.

New Orleans, Louisiana, this _____ day of April, 1992.

MARCEL LIVAUDAIS, JR.
United States District Judge

(2)

NO. 93-914

FILED
JAN 7 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT O. CUPIT AND DONNA BLAIR CUPIT
Petitioners

VERSUS

McCLANAHAN CONTRACTORS, INC., FORMERLY AWI DRILLING AND WORKOVER, INC.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Applicant has stated the issues presented for review and we have proceeded with this brief in the context of those framed issues.

LIST OF PARTIES

The parties to this action are:

ROBERT OLEN CUPIT

AWI DRILLING & WORKOVER, INC.

Note: Due to the promulgation of a number of opinions to the effect that she had no claim for loss of consortium, the claim of Mrs. Donna Cupit was dismissed prior to the commencement of the trial.

The defendant is named in the application as McClanahan Contractors, Inc. and there is a reference to the fact that this corporation was formerly known as AWI, Inc. This allegation is true as far as it goes. However, for business reasons not related to this or any other lawsuit, the assets of AWI Drilling & Workover, Inc. (a new corporation, sometime hereinafter referred to as AWID&W, Inc.) some time prior to the accident which befell the plaintiff. The corporate form of AWI, Inc. continued in existence under the name "McClanahan Contractors, Inc." However, at the time of this accident, the employer of the plaintiff (and of Doyle Samples, the toolpusher, and the owner of Rig 8, the vessel involved) was AWID&W, not AWI.

This was all corrected by agreement in the trial Court. See the judgment and the "Findings and Conclusions" of the trial Court (Pages A-10, A-12 of the Application filed in this court.) Wherein the party litigant appearing as defendant is, properly, AWID&W, Inc. We checked

LIST OF PARTIES (continued)

our pleadings in this case and the Notice of Appeal, the Supercedeus Order and the briefs of Defendant-appellant all make proper reference.

There is no issue made of this at this point. However, since the defendant is misnamed in the pleadings before this Court, confusion is possible and this will hopefully be avoided by this explanation.

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STATEMENT OF THE CASE

1. Manner of Proceeding

Plaintiff's claim against the defendant was under the Jones Act and the general maritime law. Defendant specially pleaded the Limitation of Liability Act (46 U.S.C. Section 181, et sec.). The claim of the plaintiff was tried to a jury which found the defendant guilty of negligence[1], found the vessel unseaworthy and found plaintiff guilty of thirty (30%) percent contributory negligence. The jury assessed plaintiff's damages at $300,000 and the assessment of 30% negligence had the effect of reducing his recovery to $210,000.

The district judge bifurcated the defensive claim under the Limitation of Liability Act and tried that at a later date without a jury using the evidence adduced in the Jones Act trial and such other evidence as the parties saw fit to adduce at that time. During the course of this hearing, the value of the vessel was shown to be $131,200.00. However, the district court determined that the toolpusher was a "managing agent", sufficiently high in the corporate hierarchy of the defendant such that his knowledge and participation in the accident was attributable to top management of the defendant corporation and, because of this finding, limitation was denied.

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[1] In two places in the application, appellant specifically states that the jury found the toolpusher and the president guilty of negligence (See pages 6 and 13]. This is just simply wrong. It didn't happen. Neither individual was a party to the litigation, so that a finding of personal negligence was not necessary and no special interrogatory questions were propounded for any purpose.

Defendant appealed. Defendant paid the plaintiff the amount of the limitation fund (since he was entitled to that even if the defendant prevailed on appeal) and bonded out the remainder of the judgment.

The Court of Appeal found that the toolpusher was not sufficiently high in the corporate heirarchy to constitute him a "managing agent". As a result of this finding, the judgment of the district Court was reversed and rendered and the application to this Court followed.

Statement of the Facts

The accident in this case occurred because plaintiff sought to use the "fill-up" line to bleed off pressure which had been pumped into the well stem. The fill-up line was used to put drilling mud into the system when needed. Since it penetrated into the line, it could be and was used for the bleed off of much lower pressures and there was no contraindication to that. It theoretically could have been misused to bleed off high pressures but the testimony was unanimous and uncontradicted that this should not have been done.

The issue in this application has to do with the toolpusher's status as a "managing agent"[2]. The facts of

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[2] This is the critical determination in this case. It is so because, for purposes of the applicability or the denial of Limitation, negligence of an employee of a corporate vessel owner is not attributable to the corporation unless it is the knowledge and the negligence of a person sufficiently "high up" in the corporate heirarchy. This is different, of course, where the determination is of Jones Act responsibility vel non. In such latter case, any negligence of any employee is attributable to the employer for purposes of assessing Jones Act responsibility. See the distinction

this record determinative of that issue are as follows[3]:

Fact Packet "A"

The toolpusher was Doyle Samples, Samples was a long time oil field hand, familiar with all aspects of the operation of a drilling and workover rig such as Rig 8. He was in charge of all operations aboard the rig. He supervised all employees and operations aboard the rig. He is in charge of safety and has authority to shut down the operation if it becomes unsafe and this extends to actions taken or requested by representatives of the oil company, owner of the well. He supervises the employees in this accident. He reported daily to the corporate office by telephone and by radio. In general, he had authority over and charge of all phases of operation on Rig 8.

Fact Packet "B"

All facts contained in Fact Packet "A", above - plus - Samples' job was the same as the toolpushers aboard each of the company's other rigs, and there were ten of these, each manned by a Toolpusher who was board seven days

---

(footnote 2 continued)

drawn and supported in the opinions of *Tittle v. Aldacosta*, 544 F.2d 752 (5th Cir. 1977) and *Mac Towing Co. v. American Comm. Lines*, 670 F.2d 543 (5th Cir. 1982).

[3] In its "Findings and Conclusions", the district court found certain facts upon which it based its judgment. These are set out hereinafter under the rubric "Fact Packet 'A' " for want of a better term. The Court of Appeals found these facts and certain additional facts which are set out hereinafter as "Fact Packet 'B' ". There is no dispute as to any fact set out hereinafter and each fact is fully and appropriately established by the record in this case.

then was relieved for seven days by a relief toolpusher. When the particular job being performed was completed, Samples had no say in what was done with the rig at that time, had no say in any new job that might be performed. His authority did not extend to the basic business decisions made by drilling supervisors and the president of the company.

There is no factual dispute as to any of these facts, either in Packet "A" or Packet "B". Put differently, there is agreement among those who testified in this case about each of these facts.

SUMMARY OF ARGUMENT

1. There is no pure fact finding by the appellate Court, only a decision whether to consider certain facts shown by the record, thus no violation of the manifest error rule.

2. Alternatively, the manifest error rule was properly invoked by the appellate court in this case.

3. The suggestion that there is a dispute between the circuits is not demonstrated by applicant.

ARGUMENT ON THE ISSUES FRAMED BY APPLICANT

The district court decided the case on the basis of the facts set forth above in Fact packet "A". The Court of Appeals reversed taking into consideration those facts set forth in Fact Packet "A". Plaintiff essentially takes the

position that this action constitutes a violation of the manifest error rule and that the judgment of the Court of Appeals should be reversed on this ground.

We disagree for two reasons. The decision of the Court of Appeals is not that a fact considered by the district court was true or not or was wrongly decided, the decision was whether to consider a particular fact or set of facts which everyone admits to be true and correct. We respectfully submit that the decision whether to consider a particular fact or set of facts or not to consider those facts is more a legal matter than purely a factual matter. If this is so, then there was no violation of the manifest error rule.

Alternatively, a Court of Appeals has the duty to test factual conclusions against a standard enuncuiated by this and other Courts. That test is met when the factual finding of the lower Court leaves the reviewing Court with the definite and firm conviction that a mistake has been made. The rule was enunciated by the appellate court in this instance (see 1 F.3d at 348, Application here, Page A-6) in the context of a decision that the Court in this case was obliged to consider all the facts, those in Packet "B" as well as those in Packet "A". No reason is advanced by applicant here that this was somehow improper and no suggestion of such is patent on the face of the papers.

Plaintiff also makes the contention that the opinion of the appellate court somehow creates a dispute between the circuits. However, this point is not developed and no dispute between the circuits is demonstrated in argument.

ARGUMENT - THE CORRECTNESS VEL NON OF THE DECISION BELOW

The "point-counterpoint" demonstrating the correctness of the decision of the Court of Appeal in this case is found detailed in prior jurisprudence of the Fifth Circuit in the two opinions in *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455 (5th Cir. 1982) and at 706 F.2d 1365 (5th Cir. 1983). There are discussions of the law with respect to limitation and particularly the facts which would require a determination that a particular employee was "high enough up" in the corporate heirarchy to be a "managing agent" whose knowledge would bind the corporation in this context. See specifically 677 F.2d at 466-68 and 706 F.2d at 1375-77. The employee there was one Gary Freeman. The boat owner was a land developement corporation. It had what the Court refers to as a "navy" for entertainment purposes and as a source of additional income from charters arranged by the boat captain. Freeman had complete authority in the operation of this separate phase of the boatowner's business. He was paid out of the income he generated. He had carte blanche (sic) to make charters. In short, he had the broad unlimited agency powers necessary for his knowledge and negligence to bind the corporate owner of the vessel to his negligence and knowledge.

Specifically, he had the broad general agency powers that Samples did not have. The discussion in the two Continental/Bonanza opinions clearly set forth the law and demonstrate that there is no "other circuit" problem in the case at bar.

CONCLUSION

There being no violation of the manifest error rule and there being no palbable legal error in the conclusion reached, we respectfully submit that the application by plaintiff for the issuance of this Court's writ of certiorari should be denied.

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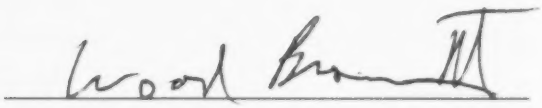
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition has been forwarded to all attorneys of record on this the 7th day of January, 1994, by depositing same in the U.S. Mail.



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